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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BUSIO LOPEZ,

Defendant and Appellant.

A121255

(Sonoma County
Super. Ct. No. SCR-465476)

A jury found defendant David Busio Lopez guilty of the felony offenses of inflicting corporal injury on a current or former spouse or cohabitant (Pen. Code, § 273.5, subd. (a))¹, false imprisonment (§§ 236, 237(a)), and preventing or dissuading a person from reporting a crime (§ 136.1, subds. (b)(1), (c)(1)). At a bench trial, the court found beyond a reasonable doubt that defendant had previously been convicted of two serious felonies and had suffered five prior convictions that qualified as strikes within the meaning of the three strikes law (§§ 667, subds. (a)(1), 1170.12). After denying defendant's motions for a new trial and to strike the prior convictions, the court sentenced him to state prison for an aggregate term of 30 years to life.

On appeal, defendant challenges the admission into evidence of uncharged domestic violence acts and prior domestic violence convictions. He also challenges the denial of his motion for a new trial based on ineffective assistance of counsel. We affirm.

¹ All further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with the felony offenses of infliction of corporal injury on a spouse, former spouse, or cohabitant, false imprisonment, and preventing or dissuading a person from reporting a crime. The offenses arose from an incident in June 2005 while defendant and his then wife Jane Doe were alone in a motel room.²

At trial Jane Doe testified about the history of her relationship with defendant. Around 2000, she met and married defendant while he was incarcerated in the county jail. After they were married, defendant was sent to prison. While defendant was in prison, he sent Jane Doe certain “official documents” concerning his prior court case involving acts of domestic violence he committed against Lila Doe. Defendant told Jane Doe that he had not done anything to Lila Doe, and that he had changed. Jane Doe believed defendant when he said that he had changed because she had changed her life after she had been convicted of felony assault.

After defendant’s release from prison at the end of May 2005, he and Jane Doe spent some time at the home of Jane Doe’s father and stepmother. Jane Doe and defendant then moved to a motel, where they stayed a week starting Sunday, June 12 through Saturday night, June 18, the day before Father’s Day.

Jane Doe testified regarding the incidents that led to the charged offenses of which defendant was convicted. One evening while they were at the motel, defendant asked Jane Doe to watch a pornographic movie with him. When Jane Doe refused to watch the movie, defendant got angry and yelled at her that she was making him mad, and he would make her watch the film with him. When Jane Doe attempted to leave the room, defendant said in a very angry voice that she was not going anywhere. He grabbed her right upper shoulder, and then put his hand on her chest and pushed her onto the bed. After he pushed her down, he put first one hand and then his other hand on her face, and then squeezed her

² Defendant was also charged with one count of forcible oral copulation, which allegedly occurred in the motel room the day after the first assaultive incident, and another count of felony false imprisonment based on an incident at the home of Jane Doe’s father and stepmother. The jury acquitted defendant of the forcible oral copulation count, and the court dismissed the second count of felony false imprisonment after the jury was unable to reach a verdict on that count.

face and pushed it into the mattress. Jane Doe told defendant he better let her go or he was going to go back to prison. Defendant responded by squeezing her face even more, and saying that he was not going to go back to that place again. Defendant also said that Jane Doe better not say anything to anybody; and that if she told anybody, he would go after her or kill her. Jane Doe believed defendant because of his angry tone of voice and what he had done to his former girlfriend. Jane Doe felt a lot of pressure on her face and she was crying; and she told defendant he was hurting her. He did not stop, but continued to squeeze her face. When she had a chance, Jane Doe bite defendant on his hand, drawing blood, which caused him to stop squeezing her face.

After the incident, Jane Doe looked at her face in a mirror and saw that the jaw area was red. Her jaw was also painful. The next morning, Jane Doe observed bruises on her face towards her chin and her face was swollen. She also had bruises on her upper right arm and on the left side of her chest. Jane was not able to open her mouth all the way, and she was only able to eat soft foods. At the time of the trial, Jane Doe still had difficulty eating some foods and on occasion her jaw locked making it difficult to open her mouth, and she suffered from headaches.

The morning after the incident, defendant's parole officer, Richard Gallego, came to the motel room to check on defendant. While Gallego was in the room, Jane Doe sat on the corner of the bed, with her head down; Gallego could only see the silhouette of her face. Jane Doe used makeup to cover her facial bruises, and she wore clothing that covered the bruises on her arm and chest. Gallegos did not see any marks or bruises on Jane Doe. When he questioned Jane Doe, she said that there was nothing wrong because she was afraid to say anything based on defendant's threats concerning what would happen if she told anyone about the incident. The officer felt that there might be a problem so he gave Jane Doe his business card and told her that if there were any problems she needed to contact him.

On Father's Day, June 19, Jane Doe and defendant went to the home of Jane Doe's father and stepmother. Jane Doe spoke with a friend and said she could not take

defendant's jealousy and abuse and needed to leave him. Jane Doe and her friend went to the friend's apartment in Napa.

On June 20, Jane Doe and her friend went to the Napa police department. Jane Doe reported defendant's conduct to then patrol officer Amy Hunter. During the conversation, Jane Doe was initially calm but as she described the incident she started to cry and shake. Officer Hunter saw Jane Doe's injuries and took a series of photographs showing bruises on her face, arm, and chest.

On June 21, Tamara Warner, then a detective in the Domestic Violence/Sexual Assault section of the Santa Rosa police department, interviewed defendant who was under arrest for spousal battery. After defendant was read his *Miranda* rights, Detective Warner questioned him about the incident in the motel room. Defendant denied arguing with Jane Doe about watching a pornographic movie. He claimed he was trying to leave Jane Doe, had told her he did not want to be with her any more and that "she was trying to hurt herself, that she was suicidal." When asked about the Jane Doe's visible injuries, defendant initially replied that he did not know what the officer was talking about. Defendant later stated the bruises on Jane Doe were not really bruises but hickeys. Warner took a photograph of a circular injury on the web of defendant's hand, which injury appeared to be a couple days old as it was "scabbed up."

On June 22, Jane Doe met with Detective Warner at the Santa Rosa police station. The detective saw that Jane Doe had a small hickey on the right side of her neck, and a photograph was taken of that area. The detective also took a series of follow-up photographs of Jane Doe's facial, chest, and arm injuries, which did not appear to be hickeys.

On June 23, Jane Doe saw her physician, who testified at trial. Jane Doe reported that she had sustained some physical injuries – she had pain in her face, her arm and her chest; she had a bruise along her jaw line; and pain in her temporal mandibular joint between the jaw and the skull. Jane Doe told the doctor she had received the jaw injury when her husband had physically taken his hand and grabbed her jaw and squeezed her face. The doctor believed that the injury on Jane Doe's face was consistent with someone

standing over a person, and squeezing and applying body weight as pressure on the person's face. The doctor also saw bruises on Jane Doe's chest wall and arm. Her bruises were consistent with Jane Doe's report that her husband had grabbed her chest and arm. Based on the color of the bruises in the photographs that were taken on June 20 at the Napa police department, the doctor believed that the bruises could have occurred at the same time, even though some of the bruises looked like they had been more recently inflicted than others. Based on Jane Doe's statements, as well as his physical examination of Jane Doe, the doctor believed that her injuries were consistent with the history she reported to him.

Jane Doe testified that at the request of her aunt she met with defense investigator Gary Bricker. Jane Doe's aunt was present during the conversation with Bricker. At the time of the conversation, Jane Doe did not want to deal with the charges against defendant by coming into court because it was too overwhelming. Bricker told her that it would be easier for her if she said that none of the incidents had happened and then she would not have to come into court because "they would just have to find [her], but they would never have probably [found her]." Jane Doe agreed to say that nothing happened. Jane Doe asked Bricker what would happen if she "turn[ed] around the story for him, [and] for [her] aunt." She did not remember if Bricker told her that she could be prosecuted if her previous statements were not true and she asked questions because she did not "know what was going on." Bricker did not ask whether she was being truthful during their discussions, and she did not tell him everything she said was true. She did tell the truth when she testified under oath in court. During a discussion before trial, Jane Doe had told a prosecutor that she had not recanted her allegations against defendant during the meeting with Bricker and her aunt. However, at trial, Jane Doe admitted she had told her aunt she had lied about the incidents concerning defendant as a favor to her aunt.

Jane Doe also spoke with Kristin Allen, a criminal investigator assigned to the district attorney's office. Allen recounted Jane Doe's statements regarding defendant's conduct and her resulting injuries. Unlike in her trial testimony, Jane Doe told Allen that after she bit defendant's hand he grabbed her face again. During a later meeting with

Allen, Jane Doe stated she had recanted her accusations to Bricker because she was tired of him. Bricker had told her to lie about the incidents and say that nothing ever happened even though that was not true.

David Boffi, an investigator for the district attorney, testified as an expert in domestic violence. Boffi had not interviewed Jane Doe and he did not know the facts of the case. He testified as to the general cyclical pattern of domestic violence, giving common examples of the conduct of an abuser and the reactions of the abused person. He testified that an abused person will tell the truth when first reporting the abuse, but may later recant the statements and will often change stories many times before actually telling the truth.

At trial, the prosecutor began her opening statement by telling the jury that “in order to understand this case, we have to go all the way [back] to the beginning” and consider what had happened to defendant’s former girlfriend, Lila Doe, who is the mother of his child. Lila Doe testified about the history of her relationship with defendant as follows.

In 1992, Lila Doe, then 16 years of age, met defendant, who was then 18 years old. Shortly after they met, they became romantically involved, and Lila Doe moved into defendant’s parents’ home. During their relationship, defendant verbally and physically abused Lila Doe on several occasions, including incidents of name calling, threats, slapping, punching, kicking, and strangling, and whipping with extension cords. She was afraid to leave because defendant threatened to kill her and her family. In March 1993, Lila Doe gave birth to their child. During the pregnancy and after the child’s birth, defendant continued to verbally and physically abuse Lila Doe. She sustained bruises and whip marks, and during one incident, defendant stabbed her in the leg with a switchblade. The jury was shown photographs of Lila Doe’s injuries. Lila Doe eventually left defendant and stayed with her mother for two months. Shortly after her return in August 1993, defendant started to physically abuse her by beating her daily. Around the end of August 1993, defendant repeatedly slammed Lila Doe’s head against the floor, told her he was going to kill her, grabbed her and lifted her into his truck and drove her to an isolated orchard, beating and punching her as he drove. He then dragged Lila Doe out of the truck

and behind some trees, and hit her with tree branches and a crowbar, telling her she was going to die. Eventually defendant calmed down. After staying in a friend's mobile home for about a week, they returned to defendant's parents' home. There, the physical abuse escalated and the hitting and whippings became very aggressive. On one occasion, defendant assaulted Lila with a gun. He pointed the gun at her head, cocked the trigger making a clicking noise, then pointed the gun upwards and shot a hole in the ceiling. Lila Doe was eventually able to leave with her child, and report defendant's physical abuse to the police.

Santa Rosa Police Detective Daniel Lujan interviewed defendant regarding Lila Doe's complaints. Defendant admitted that he hit Lila Doe on one occasion, whipping her on her arms a couple of times with "a thin rope," causing cuts on her arms. Defendant said Lila Doe had made him angry by talking about her sexual encounters with other men. He eventually apologized to Lila Doe and everything went back to normal. Defendant denied that he had stabbed Lila Doe in the leg. He claimed she had received a stab-like wound on her leg when she was poked with stick when they were play wrestling. Defendant admitted that on the day he went to the orchard with Lila Doe, he grabbed her arm and pulled her toward his truck. At the orchard, they had argued and talked, and eventually went back home. Defendant denied that he had threatened to kill Lila Doe or struck her with sticks and a crowbar, or assaulted her with a firearm, claiming that he did not own any firearms.

The jury was told that as a consequence of defendant's conduct against Lila Doe, he was convicted in April 1994 of inflicting corporal injury on a cohabitant, assault with a deadly weapon and threatening to inflict injury or death, assault with a firearm, false imprisonment, forcible oral copulation, and torture.

Defendant did not testify on his own behalf. He presented evidence challenging Jane Doe's substantive allegations against him and her general credibility.

Defendant's sister testified that on two occasions, Jane Doe told her that she "got beat up by some lady" in the neighborhood a few days before Father's Day in June 2005. Jane Doe respected the woman and did not hit her back. At trial, Jane Doe denied that she

told defendant's sister that she was beaten up by a woman in the neighborhood, that her jaw was sore from some woman striking her, and that she respected the woman so she was not going to do anything about it.

Dr. Paul Herrmann, an expert in forensic pathology, testified regarding Jane Doe's injuries as represented in some of the photographs taken on June 22 in the Santa Rosa police department. The doctor testified that the facial bruise depicted in a photograph was about five days old, but possibly, as much as seven days old, but he could not be exact. However, the doctor did not see anything unique in the photograph of the facial bruise that suggested how the bruise occurred; it could have occurred in many ways.

Jane Doe's father testified that everything was fine during the period when Jane Doe and defendant lived in his home after defendant was released from prison. The witness never saw evidence that defendant verbally or physically abused Jane Doe, and he did not see any injuries on Jane Doe's body. The witness also testified that Jane Doe was not honest all the time. At an earlier court hearing, the witness had testified that he believed that Jane Doe was truthful like any father would. But, at trial, he explained that as a father he expected that his daughter would be truthful, but in his opinion, she was not an honest person.

Jane Doe's stepmother testified that she did not see defendant do or say anything inappropriate to Jane Doe during the time they lived in her home after defendant was released from prison. The witness never saw what appeared to be physical injuries on Jane Doe. She also testified that about two or three months before the trial, Jane Doe recanted her allegations against defendant and said she had made up things because of her anger at defendant. The witness contended that Jane Doe was not an honest person. At an earlier court hearing, the witness had testified that Jane Doe was truthful but had a way of exaggerating things at times. At trial, Jane Doe denied that she had told her stepmother that the things she had been saying about defendant never really happened.

Defense investigator Bricker testified that on two occasions, October 27, 2006 and again January 3, 2007, he spoke to Jane Doe about her allegations against defendant. The interviews were held at the home of Jane Doe's aunt who was present during the

interviews. During the October interview, Bricker told Jane Doe that if she had been lying about her accusations against defendant and she recanted, she would probably be prosecuted given the nature of this case. At that interview, Jane Doe did not admit that her allegations against defendant were a lie; she contended that everything happened the way she had said. In the January interview, Jane Doe admitted that her accusations against defendant were a lie, and that she had lied to Bricker during their first interview. When Bricker asked her about the allegations against defendant, Jane denied each one. Jane Doe stated that she got a bruise on her face after a dog bumped her with his head. Jane Doe said she lied about defendant because she was angry. Bricker denied that he ever told Jane Doe what to say, or suggested to Jane Doe that she lie.

Defendant also presented evidence that in the past Jane Doe had made sexual assault complaints—which she later recanted—against her cousin and another man. At trial, Jane Doe testified that on one occasion a few years before the trial, she had been sexually assaulted by her younger cousin. Because she was afraid of losing her relationship with her aunt, Jane Doe told her aunt that the incident never took place. Jane Doe also testified that in August 2002, she reported to a nurse and a doctor at a health clinic that while she was at the clinic, she had been sexually assaulted by a man she knew. At the request of the assaulter, Jane Doe agreed to write a letter recanting her accusation. However, she never did so because she could not forgive him.

DISCUSSION

I. Admission of Domestic Violence Evidence Under Evidence Code Section 1109

A. *Relevant Facts*

Before trial, the prosecutor moved under Evidence Code section 1109 to admit evidence of defendant's prior acts of domestic violence against Lila Doe. As a consequence of his conduct, in 1994 defendant was convicted by a jury of over 20 offenses, including torture, kidnap, assault with a firearm (shot gun), four counts of infliction of corporal injury resulting in a traumatic condition on a spouse or cohabitant, three counts of criminal threats, three counts of false imprisonment, and nine counts of assault with a deadly weapon (e.g., electrical cords, hands and feet, knives, branches,

crowbar) and seven counts of assault by means of force likely to produce great bodily injury. Defendant opposed the motion, arguing that the evidence should be excluded because the prior incidents were too remote (12 years old), highly prejudicial and inflammatory, and occurred under circumstances entirely different from the offenses allegedly committed against Jane Doe.

The trial court ruled that it would allow evidence of acts of domestic violence committed against Lila Doe, but the prosecutor would only be allowed to introduce evidence of some of the prior convictions: torture, assault with a firearm, one count of corporal injury to a cohabitant, one count of criminal threats, one count of false imprisonment, and one count of assault with a deadly weapon.

B. Analysis

In enacting Evidence Code section 1109, the Legislature “recognize[d] the special nature of domestic violence crime . . .” (*People v. Johnson* (2000) 77 Cal.App.4th 410, 419.) “ ‘The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.’ (Assem. Com. Rep. on Public Safety (June 25, 1996) pp. 3-4.)” (*People v. Johnson, supra*, at p. 419.)

When a defendant is charged with a domestic violence offense, Evidence Code section 1109 permits the introduction of other uncharged acts of domestic violence.³

³ “ ‘Domestic violence’ means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has

(Evid. Code, § 1109, subds. (a)(1), (d).) However, evidence of an uncharged domestic violence act “occurring more than 10 years before the charged offense is inadmissible under [Evidence Code section 1109], unless the court determines that the admission of this evidence is in the interest of justice.” (Evid. Code, § 1109, subd. (e).) Also, even if otherwise admissible, evidence of an uncharged act of domestic violence may be inadmissible under Evidence Code section 352. (Evid. Code, § 1109, subd. (a)(1).) Evidence Code section 352 “gives the court discretion to ‘exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ [Citation.]” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1377.)

We reject defendant’s contention that this court must conduct a de novo review of the trial court’s admission of the uncharged domestic violence evidence. The trial court’s ruling is reviewed for an abuse of discretion. (*People v. Brown, supra*, 77 Cal.App.4th at p. 1377.) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citations.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) On this record, we conclude the trial court did not abuse its discretion by admitting the uncharged domestic violence evidence.

On the issue of the probative value of the evidence, the details of defendant’s uncharged domestic violence acts committed against Lila Doe “rightly served as corroborative circumstantial evidence supporting the credibility of [Jane Doe’s] testimony and the other evidence of the charged offense[s]” for which defendant was convicted. (*People v. James* (2000) 81 Cal.App.4th 1343, 1365.) Although the uncharged offenses were not exactly the same as the charged offenses, it is enough that the uncharged and

had a child or is having or has had a dating or engagement relationship.” (§ 13700, subd. (b).) “ ‘Abuse’ means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.” (§ 13700, subd. (a).)

charged offenses were based on acts of domestic violence. (Evid. Code, § 1109, subds. (a)(1), (d).) Given the defense challenge to Jane Doe’s credibility, it was highly relevant that defendant’s former girlfriend in similar living circumstances had also suffered similar abuse, even though the prior abuse may have been more extensive than the current abuse. Despite the remoteness of the prior acts and convictions, the trial court acted within its discretion by admitting the evidence in the interest of justice as it was highly probative of defendant’s propensity to commit acts of domestic violence against women with whom he was in an intimate relationship. The trial court reasonably determined that the relevancy of the evidence was not diminished by the twelve year gap between the commission of the prior offenses and the charged offenses. Defendant had been convicted of the priors offenses in 1994, spent 11 years in prison, and the current offenses were committed just two weeks after his release from prison.

“With respect to the other side of the Evidence Code section 352 balance sheet,” the presentation of the evidence concerning the uncharged domestic violence acts and convictions did not take an undue consumption of time; it compromised only a small portion of the evidence presented to the jury. (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Nor is there any indication that the jury was confused or misled by the evidence. During the two days of deliberations commencing February 21, 2007, the jurors asked no questions relating to the uncharged domestic violence evidence. The jury asked only for certain documents, and read backs of certain portions of Jane Doe’s testimony taken about two weeks earlier.

We reject defendant’s argument that Lila’s testimony was unduly prejudicial because the current offenses “did not involve violence anywhere near the level described” in her testimony. “ ‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, “prejudicial” is not synonymous with “damaging.” ’ [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) “In other words, evidence should be excluded as unduly

prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.) Here, “the prejudicial impact of the evidence” was reduced by evidence that “the uncharged offenses resulted in actual *convictions* and a prison term,” thus “ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury’s attention would not be diverted by having to make a separate determination whether defendant committed the other offenses.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) The jury was properly told how to evaluate the evidence as it related to the issue of defendant’s propensity to commit domestic violence. There was no substantial likelihood that the challenged evidence was used by the jury for an illegitimate purpose, or otherwise rendered the trial unfair.⁴

II. Denial of Defendant’s Motion for a New Trial Based on Ineffective Assistance of Counsel

A. Relevant Facts

Before trial testimony began, defendant’s trial counsel arranged for the service of a subpoena on Jane Doe’s aunt to appear in court as a defense witness. The prosecutor called her first witness on Monday, February 5, 2007, and completed the People’s case in chief on Tuesday, February 13. On Wednesday, February 14, the jury was not present.

⁴ In light of our determination that the challenged evidence was admissible under Evidence Code section 1109, we need not consider defendant’s argument that the evidence was not admissible under Evidence Code section 1101, subdivision (b). (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138 [a reviewing court need not consider admissibility of evidence under Evidence Code section 1101, subdivision (b), when evidence is admissible under Evidence Code section 1109].) The trial court also allowed evidence of a prior conviction for forcible copulation and the underlying facts as testified to by Lila Doe pursuant to Evidence Code section 1108 (admission of prior sexual offenses), and on the issue of Jane Doe’s state of mind. Given that the jury acquitted defendant of the charge of forcible oral copulation, the admission of the prior conviction for forcible oral copulation and the underlying facts was harmless. Consequently, we do not address whether the court abused its discretion in allowing the admission of that evidence.

The court and counsel discussed holding Evidence Code section 402 hearings for certain defense witnesses, including Jane Doe's aunt. On Thursday, February 15, trial counsel informed the court that Jane Doe's aunt suffered from a blood disease and was very ill. The defense then presented all of its witnesses, save for Jane Doe's aunt. On Friday, February 16, trial counsel stated that Jane Doe's aunt was still too ill to appear in court. Defense investigator Bricker had gone to the witness's home that morning and found that she was in bed and looked extremely ill. The court discharged the jury early and continued the trial to the next court day, Tuesday, February 20, at which time the court anticipated that the defense would complete its case.

When the trial resumed, trial counsel moved to have the court declare Jane Doe's aunt an unavailable witness, and in lieu of her live testimony, to allow Bricker to read into the record certain portions of the witness's testimony taken during an earlier Evidence Code section 402 hearing. Trial counsel noted that he could have suggested a continuance or some other remedy, but the requested relief was appropriate in light of the desire of the court and counsel to proceed with the case to its conclusion. In response to the prosecutor's request for some medical documentation of the witness's illness, trial counsel replied that the witness suffered from a blood disease that made her more susceptible to illness than an average person, that she was suffering from her third bout of flu that season, that she was too sick to go to the doctor, and that on previous doctor visits she had been told to stay in bed and drink fluids. Defense investigator Bricker testified that he had attempted to get the witness to come to court that morning, and offered to drive her each way, but her husband stated that she was too ill to get out of bed. Bricker saw the witness in bed, but she was not responsive and did not speak to him. Trial counsel indicated that if he were called to testify, he would state that over the preceding weekend, he had spoken with the witness's husband who said the witness could not talk to counsel directly because she was too weak to speak on the telephone.

The trial court found that despite trial counsel's diligence, Jane Doe's aunt was not available as a witness to testify at trial. In lieu of the witness's live testimony, portions of her testimony taken during an earlier court proceeding were presented. The relief was

granted over the prosecutor's objection that, due to the nature of the earlier court proceeding, she had not been able to impeach the witness for bias.

After the jury's verdict and the court's ruling on sentence enhancements, defendant—represented by new counsel—moved for a new trial on various grounds including that his trial counsel had failed to effectively impeach Jane Doe's "most damning assertion" that she was coaxed into recanting her accusations against defendant during her interview with defense investigator Bricker. According to defendant, his trial counsel should have called Jane Doe's aunt, who was present at the interview between Bricker and Jane Doe, and the jury should have heard an audiotape of Jane Doe's recantation recorded by Bricker during his interview with Jane Doe on January 3, 2007.

In support of his motion, defendant submitted a memo from Chris Reynolds, an investigator hired by defendant. Reynolds reported that on July 12, 2007, he interviewed trial counsel concerning his handling of the case. Trial counsel specifically discussed why he did not call Jane Doe's aunt as a witness. "[W]hen it came to testifying," the witness "continually reported medical conditions that would prevent her from testifying in court. [Trial counsel] was able to locate prior testimony of [the witness] which led to a stipulation between counsel to read [the witness's] account of . . . Jane Doe recanting of her prior statements. [Trial counsel] believed that [Jane Doe's aunt] . . . got cold feet when [she] realized that simply stating the information was a fabrication was not going to cause the District Attorney to dismiss the case." As to the two audiotapes of Jane Doe's statements taken during her interviews with Bricker, trial counsel stated that he did not introduce the audiotapes at trial "because after listening to the tapes, he concluded a jury might believe the story [i.e. recantation] was a fabrication and that Jane Doe was simply lying [at that time] to try and help [defendant]. [Trial counsel] made a determination that it would be better for Gary Bricker to get on the witness stand and discredit [Jane Doe] by impeaching her and denying that he made any threats or told Jane Doe to lie. [Trial counsel] believed Gary Bricker did an excellent job on the witness stand discrediting [Jane Doe] and based on the way the testimony went, [counsel] decided not to play the tape."

Defendant also submitted a declaration from Jane Doe's aunt. The witness was present during Jane Doe's interviews with Bricker, and Bricker never threatened Jane Doe or told her to lie about what happened to her. Jane Doe told her aunt that she had made up the story about defendant, that defendant never hit her or held her against her will, and that she was always able to come and go as she pleased. Jane Doe believed that if she made statements about defendant that he would spend a short time in jail and then they would resume their relationship. Jane Doe's aunt shared her concerns and information with Jane Doe's father and stepmother. Jane Doe's aunt expected that Bricker would notify the authorities or take steps to make sure that the authorities knew that Jane Doe had recanted her statement. The witness confirmed that she was "in extremely poor health," and that her "significant health issues" prevented her from testifying at defendant's trial, but if she had been called to testify, she would have specifically detailed her conversations with Jane Doe and the fact that Jane Doe had said that her story about defendant was a fabrication.

The prosecutor opposed the motion for a new trial, arguing that none of the impeaching evidence that defendant contended should have been presented would have controverted the evidence that supported the jury's verdict.

The trial court denied defendant's motion for a new trial after considering the parties' arguments, "the moving points and authorities submitted by both sides in this case, the declarations in support of the new trial motion," "the trial transcripts prepared in support of this motion," and "listen[ing] to two audio tapes submitted by the defense" of the conversations between Jane Doe and Bricker on October 27, 2006 and January 3, 2007.

B. Analysis

" " "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " " [Citation.]" (*People v. Staten* (2000) 24 Cal.4th 434, 466.) We see no abuse of discretion.

It is well settled that a motion for a new trial may be based on a claim that defendant's trial counsel was ineffective. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) "[I]n cases in which a claim of ineffective assistance of counsel is based on acts

or omissions not amounting to withdrawal of a defense, a defendant may prove such ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings." (*Id.* at p. 584.) To the extent a court is asked to evaluate defense counsel's performance, it will "defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Defendant argues that the failure of his trial counsel to play for the jury the audiotape of Jane Doe's recantation made to defense investigator Bricker was "fatal to the defense" because (a) the audiotape could have been used to "demonstrate to the jury that the demeanor of Jane Doe on the audio[tape] was completely at odds with her trial testimony with respect to the reasons she recanted," and (b) the audiotape "would have also demonstrated a calm individual free of any pressure admitting she had fabricated the entire accusation." However, we conclude the court was entitled to find that trial counsel proffered a reasonable explanation for his failure to introduce into evidence the audiotape of Jane Doe's recantation. As the court commented, the introduction into evidence of the audiotape was not the only way to impeach Jane Doe's trial testimony. Trial counsel made a tactical decision not to admit the audiotape because it would not have strengthened Bricker's credibility and might instead have given credence to Jane Doe's trial testimony that her prior recantation was false and her trial testimony was truthful. There was no reason for the court to "second-guess" trial counsel's decision. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Also, the court was entitled to find that trial counsel proffered a reasonable explanation for his failure to have Jane Doe's aunt appear in court to testify as a witness. We reject defendant's contention that "[a]t a minimum" trial counsel should have

requested either an order for a conditional examination of the witness (§§ 1335-1345)⁵ or a short continuance to allow the witness to be brought to court; “after all [the witness] was not so ill that she was unable to communicate as she clearly communicated her illness to the defense while the trial was ongoing.” Defendant’s argument ignores the fact that the witness did not tell trial counsel she would not recover from her illness in time to give testimony during the trial. Trial counsel did not learn that the witness was too ill to testify until Friday, February 16. Although the trial was continued over a three-day weekend, the witness was still too ill to come to court when the trial resumed. The report of the witness’s condition was consistent with the information trial counsel had been given by the witness’s husband during the preceding weekend—that the witness was too weak even to speak to counsel on the telephone. Given the witness’s nonresponsive condition and in the absence of a doctor’s report, there is no evidence in the record showing trial counsel had any information that would have allowed him to reasonably determine when, if ever, the witness would be available to give her testimony. Under these circumstances, trial counsel cannot be faulted for failing to request a continuance or an order permitting a conditional examination of the witness in her home. He made a reasonable decision to request the court to declare the witness unavailable and allow her previous impeachment testimony to be presented to the jury. Again, there was no reason for the court to second-guess trial counsel’s “reasonable, if difficult, tactical decision[] in the harsh light of hindsight.” (*People v. Scott, supra*, 15 Cal.4th at p. 1212.)

Nor has defendant demonstrated that the court’s ruling should be reversed because there was a reasonable possibility that there would have been a different outcome if the jury heard the additional testimony of Jane Doe’s aunt, alone or coupled with the audiotape of Jane Doe’s recantation. Jane Doe’s aunt was not a percipient witness to any of the acts committed by defendant against Jane Doe. If called as a witness, she would have proffered evidence to impeach Jane Doe’s credibility regarding her reasons for recanting her

⁵ The Penal Code permits a defendant to request that a witness be conditionally examined outside the court (§§ 1335, subd. (a), 1339, 1340) if the witness “is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial” (§ 1336, subd. (a)).

allegations against defendant in the presence of her aunt and defense investigator Bricker. However, trial counsel presented extensive evidence, through the cross-examination of the People’s witnesses and multiple defense witnesses, that challenged both Jane Doe’s general credibility and her substantive allegations against defendant. The jury was also aware that Jane Doe had recanted her allegations against defendant in the presence of her stepmother, her aunt, and Bricker. Given the extensive impeachment evidence in the record, it is highly unlikely the jury would have drawn such a negative inference from the proposed additional impeachment evidence (testimony of Jane Doe’s aunt, alone or coupled with the audiotape of Jane Doe’s recantation) that it would have acquitted defendant. “ ‘The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” (*In re Visciotti* (1996) 14 Cal.4th 325, 351-352, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Contrary to defendant’s contention, it cannot be said that the verdict here was “rendered unreliable by a breakdown in the adversary process caused by deficiencies in [trial] counsel’s assistance.” (*Strickland v. Washington, supra*, 466 U.S. at p. 700.)

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.